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In the Supreme Court of the United States

OCTOBER TERM, 1993

BFP, PETITIONER

v.

RESOLUTION TRUST CORPORATION AS RECEIVER OF IMPERIAL FEDERAL SAVINGS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

RICHARD T. ABOUSSIE
Acting General Counsel

JAMES M. BARKER
JOSEPH PATCHAN
Assistant General Counsels

MICHAEL P. CONDON
JEFFREY EHRLICH
JANICE LYNN GREEN
Counsel
Resolution Trust Corporation
Washington, D.C. 20403

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32

QUESTION PRESENTED

Whether the consideration received from a noncollusive foreclosure sale that is conducted before the commencement of a bankruptcy case and in conformance with applicable state law constitutes "reasonably equivalent value" under 11 U.S.C. 548(a)(2)(A).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provision involved	2
Statement	2
Summary of argument	8
Argument:	
The price received at a public, noncollusive foreclosure sale conducted in accordance with state law is "reasonably equivalent value" for purposes of Section 548(a)(2)(A)	10
A. The concept of "reasonably equivalent value" in Section 548(a)(2)(A) is distinct from the concept of "fair market value" and does not require judicial second-guessing of the results of a properly conducted foreclosure sale	11
B. Invalidation of a properly conducted foreclosure sale would intrude improperly on the State's core power to promulgate rules for creating and transferring interests in real property	14
C. California's procedures for conducting foreclosure sales are adequate to produce reasonably equivalent value	21
Conclusion	25
Appendix	1a

TABLE OF AUTHORITIES

Cases:	
Bank of Seoul & Trust Co. v. Marcione, 198 Cal. App. 3d 113, 244 Cal. Rptr. 1 (1988)	23

Cases – Continued: Page

Bishop v. *Wood*, 426 U.S. 341 (1976) 24
Board of Governors of the Federal Reserve System v. *MCorp Financial, Inc.*, 112 S. Ct. 459 (1991) .. 25
Boyd & Suydam v. *Dunlap*, 1 Johns. Ch. 478 (N.Y. Ch. 1815) 16
Bundles v. *Baker* (*In re Bundles*), 856 F.2d 815 (7th Cir. 1988) 6, 7
Butner v. *United States*, 440 U.S. 48 (1979) 14
Cipollone v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992) 8
Durrett v. *Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980) 7, 18
Kelly v. *Robinson*, 479 U.S. 36 (1986) 14
Madrid, In re, 21 B.R. 424 (1982), aff'd, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S. 833 (1984) 6
Miller v. *Cote*, 127 Cal. App. 3d 888, 179 Cal. Rptr. 753 (1982) 23
Perin v. *Carey*, 65 U.S. (24 How.) 465 (1861) 20
System Investment Corporation v. *Union Bank*, 21 Cal. App. 3d 137, 98 Cal. Rptr. 735 (1971) ... 23
United States v. *Doe*, 465 U.S. 605 (1984) 24
Whitman v. *Transtate Title Company*, 165 Cal. App. 3d 312, 211 Cal. Rptr. 582 (1985) 22
Winshall Settlor's Trust, In re, 758 F.2d 1136 (6th Cir. 1985) 7

Statutes:

Bankruptcy Code (11 U.S.C. 101 *et seq.*):
11 U.S.C. 101(54) (Supp. IV 1992) 14
11 U.S.C. 346(j)(7)(B) 11-12
11 U.S.C. 361(1) 11
11 U.S.C. 361(2) 11
11 U.S.C. 363(f)(3) 11
11 U.S.C. 506(a) 11, 13

Statutes – Continued: Page

11 U.S.C. 522(a)(2) 11-12
11 U.S.C. 546(a)(1) 18
11 U.S.C. 546(a)(2) 18
11 U.S.C. 547 15
11 U.S.C. 548 ..... 14, 15, 16, 17, 18, 1a
11 U.S.C. 548(a) 15, 16, 18, 1a
11 U.S.C. 548(a)(1) 15
11 U.S.C. 548(a)(2) 2, 4, 8, 9, 14, 15, 16, 19, 1a
11 U.S.C. 548(a)(2)(A) 7, 8, 10, 11, 1a
11 U.S.C. 548(c) 11
11 U.S.C. 549(c) 12
11 U.S.C. 550 18
11 U.S.C. 550(a) 11
11 U.S.C. 550(a)(1) 17
11 U.S.C. 550(d)(1) 17
11 U.S.C. 550(d)(1)(A) 18
11 U.S.C. 550(d)(1)(B) 18
11 U.S.C. 550(e) 18
11 U.S.C. 1101-1174 4
11 U.S.C. 1107(a) 10
11 U.S.C. 1112(b) 18
11 U.S.C. 1129(a)(7) 11, 13
11 U.S.C. 1325(a) 11
12 U.S.C. 1441a(b)(4)(A) (Supp. IV 1992) 24
12 U.S.C. 1818(i)(1) (Supp. I 1989) 25
12 U.S.C. 1821(d)(6) (Supp. IV 1992) 25
12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992) 25
12 U.S.C. 1821(j) (Supp. IV 1992) 24
28 U.S.C. 158(a) 5
28 U.S.C. 158(b) 5
Cal. Civ. Code (West 1993):
§ 2924 22
§ 2924b(a) 22
§ 2924b(b)(1) 22
§ 2924b(c)(3) 22
§ 2924c(e) 22

Statutes—Continued: Page

§ 2924f(b)(1) 22
§ 2924g(a) 22

Miscellaneous:

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H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) .. 13

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Texas Department of Insurance, Form T-1 (Jan. 1, 1993) 18

4A George W. Thompson, *Commentaries on the Modern Law of Real Property* (1961) 20

Uniform Fraudulent Transfer Act, 7A U.L.A. 639 (1985) 16

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 974 F.2d 1144. The opinion of the bankruptcy

[1] As we explained in footnote 2 of our brief in response to the petition for a writ of certiorari, petitioner incorrectly describes the status of the Resolution Trust Corporation (RTC). The RTC is acting in this case as receiver of Imperial Federal Savings Association (Imperial Federal), and not as receiver of Imperial Savings Association (Imperial). The Director of the Office of Thrift Supervision (OTS) appointed the RTC receiver of Imperial on June 22, 1990. OTS Order No. 90-1193. On that same day, the Director of OTS authorized the organization of Imperial Federal, and the RTC transferred certain assets and liabilities of Imperial to Imperial Federal. OTS Order Nos. 90-1194, 90-1195. On April 19, 1991, the Director of OTS appointed the RTC receiver of Imperial Federal. OTS Order No. 91-214. We have lodged with the Clerk of the Court, and provided to counsel for the parties, copies of the orders cited in this footnote. Throughout this brief, we refer for convenience to the respondents other than the RTC as the private respondents.

appellate panel in the Imperial matter (Pet. App. 49-68) is reported at 132 B.R. 748. The opinions of the district court in the matter involving the private respondents (Pet. App. 41-43, 44-48), and the opinions of the bankruptcy court in both matters (Pet. App. 28-32, 33-40) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 24-25) was entered on September 8, 1992. A petition for rehearing was denied on November 17, 1992. Pet. App. 26-27. The petition for a writ of certiorari was filed on February 16, 1993 (a Tuesday following a Monday holiday), and granted on May 24, 1993, J.A. 356. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The text of 11 U.S.C. 548(a)(2) is set forth in the appendix to this brief. App., *infra*, 1a.

STATEMENT

1. On August 27, 1987, Sheldon and Ann Foreman conveyed the real property at issue in this case to Wayne and Marlene Pedersen. On the same day, a deed was executed conveying the property from the Pedersens to petitioner (a partnership in which the partners were the Pedersens and Russell Barton).[2] Petitioner received title

[2] It has been determined in related state-court proceedings that Marlene Pedersen did not in fact execute the deed to petitioner; apparently Wayne Pedersen signed her name to that instrument without her permission, or caused a third party to do so. J.A. 253-254, 266. As discussed below, the court of appeals concluded (Pet. App. 14-17) that petitioner nevertheless received valid title to the property in question, and the validity of the conveyance to petitioner is not at issue in this Court. See Pet. Br. 49.

subject to a first lien in favor of Imperial Savings Association (Imperial), to secure payment of a loan of $356,250 made to the Pedersens to enable them to purchase the property. Petitioner granted a second lien to the Foremans, securing payment of an additional $200,000. When petitioner failed to make timely payments on the Imperial loan, Imperial commenced foreclosure proceedings under state law. The foreclosure proceedings were delayed by an involuntary bankruptcy proceeding filed against petitioner by Off Road Vehicles—Recreation and Family Campground, Inc. (ORV), which claimed title to the property in question based on a deed from the Pedersens.[3] After that bankruptcy proceeding was dismissed in June of 1989, the foreclosure proceedings were completed at a foreclosure sale on July 12, 1989. At that sale, respondent Paul Osborne purchased the property for $433,600,[4] acting on behalf of the private respondents. After the sale, a

[3] In September of 1987, the Pedersens executed an instrument purporting to convey the property in question to ORV, notwithstanding the prior deed from the Pedersens to petitioner, and apparently without the consent of their partner Mr. Barton. Petitioner and the Foremans (who, as noted above, held a second lien on the property) filed suit in state court against ORV seeking to quiet title to the property. See Pet. App. 6, 51-52; J.A. 51-52. The state court eventually ruled that the deed to ORV was invalid and quieted title against ORV. J.A. 316-320.

[4] The opinions of the court of appeals (Pet. App. 7), the bankruptcy appellate panel (Pet. App. 54), and the bankruptcy court (Pet. App. 38) recite that the price was $433,000. Although the parties occasionally have used that figure in their briefs (see Pet. 6, J.A. 60, 132, 158, 206, 292), they also frequently have stated that the price was $433,600 (see J.A. 38, 68, 92, 195, Br. in Opp. 3), and the underlying record suggests that the $433,600 figure is correct. See J.A. 235 (recital of consideration in trustee's deed), 306 (declaration regarding sale); see also Pet. Br. 10 (noting the inconsistency and suggesting that the $433,600 figure is correct).

trustee's deed was recorded evidencing the conveyance of the property from petitioner to the private respondents. See Pet. App. 3-7, 50-52; J.A. 170-174 (notice of trustee's sale), 232-236 (trustee's deed), 306-307 (declaration describing sale).[5]

2. Several months later, in October 1989, petitioner filed for bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101-1174. In the bankruptcy case, petitioner instituted an adversary proceeding seeking to set aside the conveyance of the property to the private respondents at the foreclosure sale. Petitioner argued that the sale was a fraudulent conveyance that the bankruptcy court was empowered to avoid under 11 U.S.C. 548(a)(2), which permits a bankruptcy trustee to avoid certain transfers of property of the debtor if the debtor "received less than a reasonably equivalent value in exchange for such transfer." See Pet. App. 8-9; J.A. 41-62 (text of complaint). The private respondents and Imperial filed separate motions in response to the complaint. Because the bankruptcy court disposed of the motions separately, and because they were appealed separately, we discuss the two sets of responses in turn.

a. On January 2, 1990, the private respondents filed a motion to dismiss the complaint for failure to state a claim. J.A. 63-281 (text of motion with exhibits). In a March 6, 1990, order, the bankruptcy court granted that motion. Pet. App. 28-32. The court explained that petitioner had "failed to make any allegations that the involved trustee's sale was not in compliance with California state law, nor [*sic*] any allegations that said trustee's sale was conducted collusively or fraudulently." *Id.* at 30-31. Petitioner appealed, but the district court affirmed. *Id.* at 41-43.[6] The court issued a short order stating that "the court below has ascertained and applied the existing law of this Circuit correctly in reaching its legal conclusions and its decision." *Id.* at 42.[7]

b. In April 1990, Imperial also filed a motion for judgment on the pleadings and a motion for summary judgment. J.A. 298-299, 300-302. In July 1990, the bankruptcy court granted summary judgment in favor of Imperial. Pet. App. 33-40. The court explained that the sale could not be avoided for two reasons. First, it stated that "there was no transfer of an interest of property of the Debtor when the property was sold at the sale." *Id.* at 38-39. The court explained that "the Pedersons [*sic*] did not have an interest in the property when they purported to transfer the title to the property to [petitioner]. Therefore, [petitioner] never received good title." *Id.* at 39.[8] Alternatively,

[5] Petitioner and related parties filed two separate actions in the California state courts challenging the validity of the foreclosure sale. Petitioner and the other plaintiffs voluntarily dismissed the first action shortly after it was filed, but soon filed a second action. The second action was voluntarily dismissed as to the private respondents when they filed a motion to dismiss in October 1989. See Pet. App. 8; J.A. 68-73. The RTC has advised us that the second action remains pending against it.

[6] Under 28 U.S.C. 158(b), the judicial council of a court of appeals may establish a bankruptcy appellate panel to hear appeals from decisions of bankruptcy courts under 28 U.S.C. 158(a). Those panels, however, can hear cases only "upon the consent of all the parties." 28 U.S.C. 158(b). The appeal discussed in the text initially was assigned to a bankruptcy appellate panel, but the case was transferred to the district court after petitioner objected to the panel's hearing the appeal. J.A. 6, 342-343.

[7] The district court also issued a brief opinion denying a motion for rehearing, in which petitioner asked the district court to hold the case in abeyance pending resolution of the reasonably-equivalent-value question by the Ninth Circuit bankruptcy appellate panel in another case. Pet. App. 44-48.

[8] The state trial court previously had stated in its Announcement of Tentative Decision (J.A. 252-258) that there "was a failure of con-

the court reasoned that the sale could not be invalidated even if a transfer of property of the debtor had occurred at the sale. The court stated that "a reasonably equivalent value was received in exchange for the transfer, because the nonjudicial foreclosure sale was non-collusive and regularly conducted." *Ibid.*

The bankruptcy appellate panel affirmed. Pet. App. 49-68. Applying the analysis of its decision in *In re Madrid,* 21 B.R. 424 (1982), aff'd, 725 F.2d 1197 (9th Cir.), cert. denied, 469 U.S. 833 (1984), the panel stated that

> [a] non-collusive and regularly conducted nonjudicial foreclosure sale prior to the filing of a bankruptcy case cannot be challenged as a fraudulent conveyance because the consideration received in such a sale establishes "reasonably equivalent value" as a matter of law.

Pet. App. 54-55. The panel then rejected petitioner's claims that the sale in this case was not regularly conducted. *Id.* at 56-59.[9]

3. Petitioner appealed from both decisions. Before the court of appeals resolved the appeals, the RTC was appointed receiver of Imperial Federal Savings Association, the successor in interest to Imperial Savings Association.

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sideration for the conveyance of the property [from the Foremans] to * * * Wayne and Marlene Pedersen." *Id.* at 255. The court concluded that the failure of consideration "justifies and requires the rescission of the Foreman's [*sic*] deed [to the Pedersens]." *Ibid.*

[9] Bankruptcy Judge Volinn dissented. Pet. App. 60-68. He argued that the panel should adopt the reasoning articulated by the Seventh Circuit in *Bundles* v. *Baker* (*In re Bundles*), 856 F.2d 815, 820, 824 (1988), under which there is a rebuttable presumption that the price obtained at a noncollusive foreclosure sale constitutes reasonably equivalent value.

See Pet. App. 5 n.1; note 1, *supra.* The court of appeals consolidated petitioner's appeals from the two decisions and affirmed. Pet. App. 1-23. The court first considered whether petitioner had a property interest at the time of the foreclosure sale. *Id.* at 14-17. Relying on the terms of the judgment of the state court, the court rejected the bankruptcy court's conclusion that petitioner never received title to the property. *Id.* at 15.[10]

On the "reasonably equivalent value" question, the court adopted the view of the Sixth Circuit that the consideration received at a noncollusive, regularly conducted foreclosure sale constitutes a reasonably equivalent value under Section 548(a)(2)(A). Pet. App. 17-18 (citing *In re Winshall Settlor's Trust,* 758 F.2d 1136, 1139 (6th Cir. 1985)). The court explained that it "necessarily part[ed] from the positions taken by the Fifth Circuit in *Durrett* [v. *Washington National Insurance Co.,* 621 F.2d 201 (1980),] and the Seventh Circuit in *Bundles* [v. *Baker* (*In re Bundles*), 856 F.2d 815, 820 (1988)]." Pet. App. 18-19 (footnote omitted).[11] In the court's view, "allowing a bankruptcy court to undo a foreclosure sale carries with it the strong potential to destabilize state mortgage transactions." *Id.* at 20. The court found that result

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[10] Although the state court previously had reached a different conclusion, see note 8, *supra,* its formal judgment filed on October 12, 1989, stated without explanation that petitioner had an interest in the property. J.A. 319 ("It is further ordered, adjudged and decreed that [petitioner], Sheldon L. Foreman and Ann Fant Foreman are the sole owners of said real property in fee simple.").

[11] As mentioned in note 9, *supra, Bundles* adopted a rebuttable presumption that the price obtained at a noncollusive foreclosure sale constitutes reasonably equivalent value. 856 F.2d at 820, 824. Interpreting a provision of the old Bankruptcy Act analogous to Section 548(a)(2), *Durrett* suggested that any foreclosure sale producing less than 70% of fair market value should be invalidated. 621 F.2d at 203-204.

> untenable from both federal and state perspectives. From a state viewpoint, an ad hoc approach produces intolerable uncertainty regarding the finality of any purchase at a foreclosure sale even if the price paid at the sale is close to, but not equal to, the retail market value. From a federal perspective, this uncertainty undermines the price-maximizing objectives of section 548(a)(2) because potential buyers will discount their assessment of the true market value of the property to reflect this uncertainty.

Id. at 20-21 (internal quotation marks omitted). Noting this Court's admonition that "interpretation of federal statutes should be tempered with due regard for traditional state areas of regulation," *id.* at 22 (citing *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-2618 (1992)), the court held that the price received at a noncollusive, regularly conducted foreclosure sale establishes reasonably equivalent value for purposes of Section 548(a)(2)(A).

SUMMARY OF ARGUMENT

The Bankruptcy Code authorizes the avoidance of certain transfers made by a debtor up to one year before the debtor filed for bankruptcy if the debtor did not receive "reasonably equivalent value" for the property it transferred. Section 548(a)(2).[12] Petitioner contends that the statutory language authorizes bankruptcy courts to second-guess the bidding that took place at a regularly conducted and noncollusive foreclosure sale, overturn the sale, and reclaim the property from the purchaser at the foreclosure sale. We disagree with that contention for three reasons.

[12] For ease of reference, this brief refers to provisions of the 1988 version of Title 11 by Section number only.

First, petitioner's argument rests on the assumption that Section 548(a)(2) allows invalidation of all transfers for which the debtor did not receive the price that conventional marketing of the property might bring. Section 548(a)(2) does not require, however, that the debtor receive that measure of value—commonly denominated "fair market value"—in exchange for the property, but only "reasonably equivalent value." To be sure, the sale price in a foreclosure proceeding may be less than the price that professional real estate brokers promoting the property in the conventional market might obtain. But that difference is to be expected, because the foreclosure process—by definition—must dispose of property with dispatch, and thus must value the property and transfer title without the expenditure of funds or the passage of time that would occur in the ordinary course of a sale by conventional means. A properly conducted foreclosure sale provides an acceptable measure of "reasonably equivalent value" for that property under the circumstances, if it brings together persons interested in purchasing such property and allows them to bid fairly on its purchase.

Second, petitioner's interpretation would undermine the States' traditional role in our federal system as the authorities that promulgate and enforce rules for the creation and transfer of interests in real property, including rules for transfers by foreclosure. The States have established rules governing foreclosure sales that reflect the weighing of the relative rights and obligations of the affected parties. Under petitioner's interpretation, a federal bankruptcy court could override the State's judgment in this core area and repudiate a properly conducted foreclosure sale. Indeed, if petitioner were correct, no purchaser at a foreclosure sale could be sure it had clear title until the end of the lengthy period during which the sale could be challenged in a bankruptcy proceeding. There is

no persuasive reason to believe that Congress intended that destabilizing result, which would directly impede the transfer and development of real property.

Finally, the procedures that the States employ in foreclosure sales provide an adequate basis for determining value in the context of a forced liquidation. In California, a foreclosing lender must give more than three months' notice of the sale to the borrower and other parties who have requested notice and publish notice in a newspaper of general circulation in the area. The sale must be by open auction and must take place during regular business hours. Although those procedures may not produce the precise equivalent of fair market value, they are sufficient to protect against the possibility that property will be sold for substantially less than fair market value. Accordingly, they are adequate to determine "reasonably equivalent value" for purposes of Section 548(a)(2)(A). Hence, the court of appeals correctly declined to second-guess the price received at the foreclosure sale in this case.

ARGUMENT

THE PRICE RECEIVED AT A PUBLIC, NONCOLLUSIVE FORECLOSURE SALE CONDUCTED IN ACCORDANCE WITH STATE LAW IS "REASONABLY EQUIVALENT VALUE" FOR PURPOSES OF SECTION 548(a)(2)(A)

Section 548(a)(2)(A) of the Bankruptcy Code grants trustees in bankruptcy the power to avoid certain transfers made "within one year before the date of the filing of the petition," if the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation."[13] Petitioner contends (Pet. Br. 27-40) that a trustee

[13] In this case, petitioner (the debtor) makes the claim directly, rather than through a trustee. That is appropriate under Section 1107(a), which provides that in Chapter 11 cases where a trustee has not been appointed, "a debtor in possession shall have all the rights [with exceptions not relevant here] and powers * * * of a trustee serving in a case under this chapter."

is entitled under that provision to reclaim property sold before the bankruptcy filing at a public foreclosure sale that conformed in every way to the requirements for such a sale under applicable state law, on the theory that the price the debtor received at the public auction was not necessarily "reasonably equivalent" to the value of the property at that time. We disagree, for three reasons: because petitioner's reading fails to accord significance to the language chosen by Congress, because it results in an unwarranted intrusion of federal bankruptcy law into areas customarily governed by state law, and because the applicable state rules in this case adequately protect the debtor's interest in the property conveyed at foreclosure.

A. The Concept Of "Reasonably Equivalent Value" In Section 548(a)(2)(A) Is Distinct From The Concept Of "Fair Market Value" And Does Not Require Judicial Second-Guessing Of The Results Of A Properly Conducted Foreclosure Sale

The first difficulty with petitioner's reading is that it accords no significance to the language of the statute. Section 548(a)(2)(A) does not use the unadorned term "value," as many other provisions of the Code do,[14] or even the similar phrase "fair market value," which is used occasionally in other provisions of the Code, see Sections

[14] See, *e.g.*, Sections 361(1), (2) (adequate protection), 363(f)(3) (sale of property of estate), 506(a) (determination of secured status), 1129(a)(7) (confirmation of Chapter 11 plan), 1325(a) (confirmation of Chapter 13 plan). It is especially noteworthy that the Code uses the simple term "value" more than once in provisions closely related to Section 548(a)(2)(A). See Sections 548(c) (purchaser protected who takes for "value"), 550(a) (liability of transferee of avoided purchase extends to "value" of property).

346(j)(7)(B), 522(a)(2). Instead, Congress used the phrase "reasonably equivalent value," which appears in the Code only in this provision.[15] Congress's choice of the qualified formulation affects the meaning of the statute in two ways. First, it necessarily lowers the threshold of acceptable compensation: the statute does not require an "equivalent" value, but only a "reasonably equivalent" value. Second, by directing courts to consider whether the compensation a debtor received upon conveyance of property was "reasonably equivalent," Congress authorized courts to consider factors that would not have been relevant in determining "fair market value."

That point weighs heavily in this case. Petitioner could make a strong argument that the consideration received at a foreclosure sale is not "equivalent" to the value the property would bring if professional real estate brokers, working for a substantial fee, promoted the property in the conventional market. But that does not mean that the consideration falls short of "reasonably equivalent value" in exchange for the property. In determining "reasonably equivalent value," a court must take into account the fact that the debtor's failure to satisfy its financial obligations has made it necessary for the creditor to liquidate the collateral in accordance with the terms of the agreement of the parties. If those circumstances result in a transfer at a price that is not precisely equivalent to some abstract valuation of the property, the price nevertheless should be considered reasonably equivalent value under the circumstances.

Moreover, petitioner's view of the statute fails to acknowledge the implications of the term "value." In our economy, the "value" of an item generally is the amount

[15] Congress also used the related term "fair equivalent value" in Section 549(c) to describe the standard for avoiding rescission of a post-bankruptcy transfer made to a transferee without knowledge of the case.

of money that a person would be willing to pay for the item, an amount that each person determines based on his evaluation of the potential risks and benefits of owning the property. The best evidence of value, then, is the amount of money the item actually brought upon sale in an open market. In many cases, of course, courts must fix a price as a substitute for a market transaction that has not taken place. See, *e.g.*, Sections 506(a) (determination of value of property of estate for purposes of determining secured status), 1129(a)(7) (determination of value for purposes of confirming plan of reorganization). In those situations, courts of necessity must rely on expert testimony and other secondary evidence to form the best estimate possible.[16] But in cases in which property actually has been sold in an open market, a court attempting to ascertain the "true" value of the property should be quite reluctant to second-guess the market by crediting evidence introduced to support a finding that the property had a value at the time of the sale higher than the value it brought at the sale. Whether the evidence rests on expert testimony as to amounts that nonexistent, hypothetical purchasers supposedly would have paid for the property, or evidence regarding the amount that actual purchasers paid for other pieces of property thought to be similar, such evidence is inherently suspect whenever it is used to support a finding of a "value" for property that is contradicted by the results of an actual market transaction that occurred at the relevant time. In sum, so long as the sale conforms with applicable state law and results in an open sale under conditions reasonably designed to offer an op-

[16] Congress was well aware of the difficulties courts would face in determining accurate values even in the circumstances where judicial valuation was required. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 222 (1977) (characterizing valuation of business for purposes of confirming a plan of reorganization as "a guess compounded by an estimate") (quoting Peter Coogan).

portunity for any interested parties to bid on the property, the court should accept the price the property brings at the sale as reasonably equivalent value.[14]

B. Invalidation Of A Properly Conducted Foreclosure Sale Would Intrude Improperly On The States' Core Power To Promulgate Rules For Creating And Transferring Interests In Real Property

The Bankruptcy Code displays respect for state rules of property law, which Congress generally has allowed to remain in force except where "some federal interest requires a different result." *Butner* v. *United States,* 440 U.S. 48, 55 (1979). See *ibid.* (courts should avoid granting "a windfall merely by reason of the happenstance of bankruptcy") (internal quotation marks omitted). As the Court has explained, "[w]e do not read these statutory words with the ease of a computer," but must allow notions of "our federalism * * * [to] influence our interpretation of the Bankruptcy Code." *Kelly* v. *Robinson,* 479 U.S. 36, 49 (1986) (internal quotation marks omitted). A rule allowing federal courts to overturn foreclosure sales that are con-

[17] Petitioner's amicus suggests (Allen *et al.* Amicus Br. 11-13) that provisions in the Bankruptcy Code defining "transfer" to include a foreclosure, 11 U.S.C. 101(54) (Supp. IV 1992), and extending the Section 548 avoidance power to involuntary transfers demonstrate that all foreclosure sales are subject to avoidance under Section 548. That suggestion is incorrect. Those provisions simply establish that foreclosure sales fall within the general definition of "transfer" that is subject to avoidance under Section 548(a)(2); they do not address the question of what type of proof is necessary to establish that any particular foreclosure sale may be avoided under Section 548(a)(2). As the text suggests, we believe it would be appropriate to invalidate foreclosure sales that are collusive or otherwise fail to comply with state law. Absent the provisions on which petitioner's amicus relies, it would be open to question whether the trustee would have the power to avoid such a sale.

ducted in accordance with state law does not afford sufficient weight to the States' legitimate interest in promulgating reliable and stable norms for the creation and transfer of interests in real property.

A variety of factors combine to aggravate the destabilizing effect petitioner's reading would have on the systems the States have developed for allowing creditors to take title to collateral upon a default by their debtors. At the threshold is the circumstance that the avoiding power under Section 548(a) reaches outside the bankruptcy proceeding to invalidate a transaction that took place before a bankruptcy petition was filed. Absent some substantial federal interest, the parties to such a transaction are entitled to rely on the procedures for transferring property permitted by state law and agreed upon in their contract.

There are, of course, certain circumstances in which important federal policies justify the invalidation of pre-bankruptcy transactions. Section 547 allows the invalidation of preferences—transactions that in Congress's view tend to allow one creditor to receive an unduly large share of the debtor's assets. Similarly, Section 548 allows the trustee to invalidate fraudulent conveyances—transactions by which the debtor dissipates the estate before the bankruptcy petition is filed. That Section allows the trustee to avoid not only transactions in which the debtor actually intended to defraud creditors, Section 548(a)(1), but also transactions that are only constructively fraudulent, where fraud may be presumed from the inadequacy of the consideration, Section 548(a)(2). See Thomas H. Jackson, *Avoiding Powers in Bankruptcy,* 36 Stan. L. Rev. 725, 778 (1984) ("Since here, as elsewhere, proving intent is difficult, * * * [certain] [a]ctions * * * are presumed to be fraudulently motivated.").[18]

[18] See generally John C. McCoid II, *Constructively Fraudulent Conveyances: Transfers for Inadequate Consideration,* 62 Texas L.

But when the transfer occurs pursuant to a noncollusive foreclosure sale, there is no basis for supposing that the debtor or any other party has engaged in conduct designed to dissipate the estate. The debtor had no choice in the matter, and the creditor who foreclosed on the property was simply enforcing a prearranged procedure for establishing the value of the collateral in the event of a default by the debtor. Accordingly, the policies on which Section 548(a)(2) rests do not support stretching the language of the statute to allow invalidation of such transactions.

The most serious consequences of invalidating pre-bankruptcy foreclosure sales stem from the problem that under such a rule no purchaser at a foreclosure sale could be sure that it had received clear title to the property, no matter what it paid. For example, if the purchaser's estimates of the likely profits from a particular asset and of an appropriate interest rate would justify a particular price, and if it succeeded in purchasing the property at the foreclosure sale for a price quite close to that upper limit,

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Rev. 639, 643-644 (1983) (explaining distinction between actual and constructive fraud in the Uniform Fraudulent Conveyance Act and Section 548(a)). The power to avoid transfers that were only constructively fraudulent apparently stems from Chancellor Kent's decision in *Boyd & Suydam* v. *Dunlap*, 1 Johns. Ch. 478 (N.Y. Ch. 1815). See McCoid, *supra*, 62 Texas L. Rev. at 649-652. That rule was codified in the Uniform Fraudulent Conveyance Act in 1918, on which Section 548 was modeled. See *id.* at 643. Since the Bankruptcy Code was enacted, the National Conference of Commissioners on Uniform State Laws has addressed the problem at issue in this case specifically, in the 1985 Uniform Fraudulent Transfer Act. That Act provides that a person "gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale." Uniform Fraudulent Transfer Act § 3(b), 7A U.L.A. 650 (1985). See Peter A. Alces & Luther M. Dorr, Jr., *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. Ill. L. Rev. 527, 540-541.

the purchaser nevertheless would be exposed to a risk of rescission, because the bankruptcy court might accept more optimistic assessments of the property offered by the debtor, and thus value the property at a higher figure. That problem is exacerbated by the timing of the inquiry: if the property has appreciated in value since the time of the foreclosure sale, a court deciding with the benefit of hindsight may be reluctant to attribute a value to the property as of the time of the transfer significantly lower than the value the property has at the time of the determination in the Section 548 proceeding.[19]

The Bankruptcy Code's remedial provisions also ensure that the possibility of rescission that would exist under petitioner's reading of the statute would undermine a purchaser's incentive to bid at a foreclosure sale. First, Section 550(a)(1) grants the bankruptcy trustee the power to recover the property purchased at the foreclosure sale. Although Section 550(d)(1) provides that the purchaser will retain a lien on the property to secure the cost of improvements made to the property after the purchase, Section 550(d)(1) does not provide a complete remedy to the purchaser for at least two reasons. First, it does not require repayment of the costs of improvements, but only grants a lien, so that any funds the purchaser has invested in the property will remain tied up in the property indefinitely. Second, the amount of the lien does not completely compensate the purchaser for its development of the property, because the lien is limited to the lesser of the

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[19] See Robert M. Zinman, *Noncollusive, Regularly Conducted Foreclosure Sales: Involuntary, Nonfraudulent Transfers*, 9 Cardozo L. Rev. 581, 596 (1987) ("The fact is that the mortgagee of commercial real estate has no way of knowing what a judge, using hindsight, and perhaps with a special agenda, will determine to be the value of the property.").

net investment in the property, Section 550(d)(1)(A), or the increase in value of the property after the transfer, Section 550(d)(1)(B). Thus, if the purchaser makes a fruitful investment in the property (which increases the value of the property by an amount greater than the amount of the investment), the trustee will reap the rewards of the investment, because the lien will be limited to the costs of the investment. If the investment is unsuccessful (that is, if it increases the value of the property by an amount lower than the amount of the investment), the purchaser will bear the loss, because the lien will be limited to the increase in value.

The combined effect of those provisions would deprive a purchaser of property at a foreclosure sale of a secure ability to profit from development of property purchased at a foreclosure sale until the lengthy and indefinite statute of limitations runs[20] on the debtor's ability to challenge the foreclosure under Section 548.[21] Indeed, if a trustee

[20] An action to recover property under Section 550 must be brought before the earlier of the conclusion of the case or one year after the transfer was avoided. Section 550(e). The trustee's avoiding power under Section 548(a), in turn, extends to any transfer made "within one year before the * * * filing of the petition." Finally, under Section 546(a)(1), an action under Section 548 may not be commenced more than two years after the appointment of a trustee. In cases like this one, where a trustee is not appointed, an action under Section 548 may be brought at any time before the case is closed or dismissed, Section 546(a)(2). In a successful case, that does not occur until the conclusion of payments under the plan. Section 1112(b).

[21] Nor can the purchaser protect itself by purchasing insurance. In the wake of the Fifth Circuit's decision in *Durrett* v. *Washington National Insurance Co., supra,* many States do not allow title insurance companies to issue insurance that would protect a purchaser at a foreclosure sale against the possibility that the sale will be invalidated in bankruptcy. See, *e.g.*, Texas Department of Insurance, Form T-1, Exclusions from Coverage 5, at 4 (Jan. 1, 1993) (exclusion from Owner

believed that it could establish that the foreclosure sale price was inadequate, it would be in a position to speculate on the value of the property and the success of any future development by delaying a Section 548(a)(2) complaint to observe changes in the value of the property. If the property decreased to a value lower than the consideration received at the foreclosure sale, the trustee could refrain from seeking to rescind the sale. If, on the other hand, the efforts of the purchaser resulted in a significant increase in value, the trustee could file a complaint and step in to retake control of the property.

Accordingly, a rule allowing federal courts to invalidate foreclosure sales that were conducted in accordance with state law and the agreement of the parties before filing of the bankruptcy petition would significantly limit the incentive of individuals considering a purchase at a foreclosure sale. Such a limitation could be expected to lead to lower revenues for debtors—and hence less funds with which to repay the debts owed other creditors—as well as to significant disincentives for development of properties that are purchased at foreclosure sales.[22]

Policy of Title Insurance for "[a]ny claim which arises out of the transaction vesting in the [insured] the estate or interest insured by this policy, by reason of the operation of federal bankruptcy * * * laws that is based on * * * the transaction creating the estate or interest Insured by this Policy being deemed a fraudulent conveyance"); see also Federal Home Loan Mortgage Corporation *et al.* Amicus Br. 13 & n.10 (discussing similar forms promulgated by American Land Title Association).

[22] Petitioner's amicus suggests that purchasers would respond to a rule permitting invalidation of sales for inadequate consideration by bidding more (in an attempt to limit the chance that a court subsequently would invalidate the purchase under Section 548(a)(2)). Allen *et al.* Amicus Br. 50-51. Because it assumes that a rule lessening the rights acquired upon purchase would result in an increased purchase price, that suggestion is quite counterintuitive. See Douglas G. Baird

In a tradition running at least back to the thirteenth century statutes of mortmain, lawmakers in the Anglo-American tradition have disfavored rules that "frustrated" "the general policy of the common law, which favored the free circulation of property," *Perin* v. *Carey*, 65 U.S. (24 How.) 465, 495 (1861) (emphasis omitted).[23] The rule

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& Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 Vand. L. Rev. 829, 846 (1985) (explaining why a rule permitting invalidation of foreclosure sales as fraudulent conveyances would lead to reduced prices at such sales); McCoid, *supra*, 62 Texas L. Rev. at 661 (same).

Petitioner's amicus also suggests that Professor Shuchman's empirical research has "demonstrate[d] that in the circuits employing *Durrett* and its progeny there have been no negative effects engendered at foreclosure sales." Allen *et al.* Amicus Br. 53-54 (citing Philip Shuchman, *Data on the* Durrett *Controversy*, 9 Cardozo L. Rev. 605, 616 (1987)). Professor Shuchman's claims, however, are considerably overstated. First, his study looked only to the rate of mortgage lending, the loan-to-value ratio, and the interest rate offered by the lenders. See *id.* at 629-636. Given the relatively small fraction of loans that become subject to foreclosure, only a dramatic effect on the anticipated result upon foreclosure could be expected to have a significant effect on the terms of the loan up front. See Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 Va. L. Rev. 489, 500-515 (1991) (empirical study concluding that laws protecting mortgagors do not have a significant impact on interest rates). Second, his evidence considers only residential mortgage lending, which, because it involves relatively small dollar values, is likely to be less sensitive to such effects. Finally, even within that limited area, his evidence in fact shows that the rate of mortgage lending in Texas – the principal state affected by the *Durrett* case – in fact grew at a rate considerably lower than the national average for the two years immediately following this Court's denial of a petition for a writ of certiorari raising the question. See Robert M. Zinman, Durrett *Data: Shucking the Husks from the Grain*, 9 Cardozo L. Rev. 1013 (1988) (identifying flaws in Professor Shuchman's empirical study).

[23] For a general discussion of early mortmain provisions, see 4A George W. Thompson, *Commentaries on the Modern Law of Real Property* § 2014, at 600-602 (1961).

sought by petitioner in this case would frustrate that policy. Of course, if Congress had enacted a statute that clearly stated the rule sought by petitioner, the decision in this case would be obvious and the foregoing presentation would be irrelevant. But the Bankruptcy Code does not by its terms authorize federal courts to invalidate transactions that bring less than a "fair market value," and does not even implicitly prescribe a method for federal courts to use in determining what is a "reasonably equivalent value." Hence, the Code does not require federal courts to overturn the mechanisms established under state law, and agreed to by the parties, for placing a value on collateral upon an entity's failure to repay a debt. In light of our country's long tradition of state-law preeminence in crafting rules for the creation and transfer of interests in real property, and the strong interest in those rules permitting parties to agree upon enforceable procedures for future transfers of property, only a clear statement should be sufficient to persuade courts that Congress intended to require federal bankruptcy courts to overturn properly conducted foreclosure sales. Because the Code lacks any such rule entirely, much less a clear statement of such a rule, the court of appeals correctly determined that reasonably equivalent value should be determined by reference to the price for which the property sold at a regularly conducted foreclosure sale.

C. California's Procedures For Conducting Foreclosure Sales Are Adequate To Produce Reasonably Equivalent Value

Because fair procedures for sale are necessary for a sale to be a reliable method of determining reasonably equivalent value, it is important to examine the procedures under which California permits foreclosures to occur. Although petitioner's amicus devotes a considerable portion of its

brief to a largely anecdotal criticism of the procedures the States have established for foreclosure sales, Allen *et al.* Amicus Br. 41-49, that discussion does not refer to any of the California procedures at issue in this case. Those procedures are fully adequate to justify a federal court in respecting the result of such a sale as reasonably equivalent value.

Under Cal. Civ. Code § 2924 (West 1993), a lender wishing to conduct a nonjudicial foreclosure sale must start by filing a notice of default with the county recorder, identifying the property and the nature of the default. Within ten days thereafter, the lender must send the notice not only to the defaulting borrower, but also to any party that has notified the county recorder that it wishes to receive notice of a default with respect to the land in question. *Id.* § 2924b(a), (b)(1). After a three-month waiting period, the lender must give notice of the sale. *Id.* § 2924. At least 20 days before the sale, the notice must be sent to the parties who have requested notice under Section 2924b(a) and also must be posted at the site of the sale and at the location of the delinquent property. *Id.* §§ 2924b(c)(3), 2924f(b)(1). The notice also must be published weekly in a local newspaper of general circulation. *Id.* § 2924f(b)(1). The debtor has the right to cure the default at any time up to five days before the sale. *Id.* § 2924c(e). Finally, the sale must take place in the county where the property is situated and must "be made at auction, to the highest bidder," between the hours of 9:00 a.m. and 5:00 p.m. on a business day. *Id.* § 2924g(a).

Courts interpreting those provisions have been vigilant in their efforts to ensure compliance with the statutory requirements. See, *e.g.*, *Whitman* v. *Transtate Title Company,* 165 Cal. App. 3d 312, 322, 211 Cal. Rptr. 582, 589 (1985) ("We further observe that the foreclosure procedure, being statutorily prescribed, must be strictly com-

plied with."); *Miller* v. *Cote,* 127 Cal. App. 3d 888, 894, 179 Cal. Rptr. 753, 756-757 (1982) ("The statutory requirements must be strictly complied with."); *System Investment Corporation* v. *Union Bank,* 21 Cal. App. 3d 137, 152-153, 98 Cal. Rptr. 735, 744-745 (1971) (procedures "must be strictly followed"). Similarly, as the California Court of Appeal has explained:

> The trustee at a foreclosure sale * * * has a duty to conduct the sale fairly and openly, and to secure the best price for the trustor's benefit. * * *
>
> * * * * *
>
> The courts scrutinize a sale held under power in a trust deed carefully, and will not sustain it unless it is conducted with fairness, openness, and scrupulous integrity, and the trustee exercises sound discretion to protect the rights of all interested parties and obtain the best possible price.

Bank of Seoul & Trust Co. v. *Marcione,* 198 Cal. App. 3d 113, 118-119, 244 Cal. Rptr. 1, 3 (1988).[24]

Hence, notwithstanding the anecdotal impressions offered by petitioner's amicus, the actual state of the law is that California statutes require ample notice of the sale to be sent to all interested parties, which gives the borrower a fair opportunity to identify a buyer willing to purchase the property for its actual value. Furthermore, California courts have shown that they stand ready to invalidate a foreclosure sale that does not fully comply with those procedures. In those circumstances, federal courts attempting to evaluate the transfer after the fact should limit their inquiry to determining whether the sale was conducted in

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[24] We quote the version of this passage that appears in the California Appellate reporter; the version in the California Reporter publication contains what appears to be a typographical error.

accordance with the prescribed procedures.[25] If the sale was conducted in accordance with state law, the court should credit the price for which the property sold as reasonably equivalent value.[26]

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[25] Petitioner briefly argues (Pet. Br. 47-48) that the sale was not conducted in accordance with applicable state law. That argument is not included within the questions presented in the petition, which presuppose "a non-collusive regularly conducted foreclosure sale" and "compliance with state laws on foreclosure." Pet. i. In any event, the bankruptcy court (Pet. App. 30-31), the bankruptcy appellate panel (Pet. App. 56-59), and the court of appeals (Pet. App. 23 n.7) each concluded that the sale was properly conducted. Petitioner offers no basis for questioning the correctness of those concurrent findings of the lower courts. See *United States* v. *Doe*, 465 U.S. 605, 614 (1984) (Court is "reluctant to disturb findings of fact in which two courts below have concurred."); *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976) (questions of state law on which lower courts agreed do not warrant review by Supreme Court).

[26] Although the question of remedy is not before the Court, petitioner suggests (Pet. Br. 48-49) that some remedy other than invalidation of the sale and recovery of the property might be available. In light of that suggestion, a few brief comments on the issue are appropriate. Petitioner's complaint asked only that the court "declare the transfer of assets to [the private respondents] null and void, vacate and set aside the trustee's deed of trust [*sic*] given with respect thereto, and award [petitioner] costs of action and such other and further relief as the [c]ourt may deem just." J.A. 61-62. Because the property is not in the hands of the RTC, petitioner apparently would not seek that injunctive relief against the RTC. In any event, injunctive relief against the RTC as receiver would be barred by 12 U.S.C. 1821(j) (Supp. IV 1992) ("Except as provided in this section, no court may take any action * * * to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or receiver."); see 12 U.S.C. 1441a(b)(4)(A) (Supp. IV 1992) (RTC "shall have the same powers and rights to carry out its duties [where it was appointed receiver for a failed savings and loan institution between December 31, 1988, and October 1, 1993,] as the Federal Deposit Insurance Corporation has under sections 1821, 1822, and 1823 of this title."); see also *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, 112 S. Ct. 459, 463-466 (1991) (interpreting a similar provision in 12 U.S.C. 1818(i)(1) (Supp. I 1989)).

To the extent petitioner believes, as its brief suggests (Pet. Br. 48-49), that it is entitled to monetary damages from the RTC as receiver, neither the bankruptcy court nor the district court have jurisdiction over such a claim, because petitioner has not exhausted the administrative remedies available for such claims. See 12 U.S.C. 1821(d)(6) (Supp. IV 1992) (judicial review of claims against FDIC or RTC as receiver permitted after claimant seeks administrative review); 12 U.S.C. 1821(d)(13)(D) (Supp. IV 1992) ("Except as otherwise provided in this subsection, no court shall have jurisdiction over" claims against FDIC or RTC as receiver.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

RICHARD T. ABOUSSIE
Acting General Counsel
JAMES M. BARKER
JOSEPH PATCHAN
Assistant General Counsels
MICHAEL P. CONDON
JEFFREY EHRLICH
JANICE LYNN GREEN
Counsel
Resolution Trust Corporation

FRANK W. HUNGER
Assistant Attorney General
JEFFREY P. MINEAR
Assistant to the Solicitor General
RONALD J. MANN
Assistant to the Solicitor General

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APPENDIX

Section 548(a)(2) of the Bankruptcy Code, 11 U.S.C. 548(a)(2), provides:

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

* * * * *

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

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